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No. 97-1754

In The

Supreme Court of the United States

October Term, 1997

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant this Petition for Writ of Certiorari when the facts underpinning the Board of Immigration Appeals' and the Court of Appeals' decisions are not the facts of this case.

2. Whether this Court should grant this Petition for Writ of Certiorari to consider an unremarkable exercise of judicial review, where there is no circuit conflict on the issue decided, and where the legal and factual issues are narrow and infrequently raised.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Juan Anibal Aguirre-Aguirre hereby opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT

Central to the Immigration and Naturalization Service's (INS) Petition and the decision of the Board of Immigration Appeals (BIA) below was their belief that Mr. Aguirre committed serious crimes against civilians in Guatemala before fleeing to the United States. This contention is based on a transcript of the immigration judge (IJ) hearing in this case, held on April 5, 1995. Recently obtained information demonstrates that the transcript contains significant errors, and the INS, the BIA, and the Court of Appeals were mistaken about Mr. Aguirre's conduct in Guatemala. In short, this is not the same case the BIA and the Court of Appeals decided and this Court cannot grant certiorari under these circumstances.

At the hearing, Mr. Aguirre testified in Spanish; an interpreter interpreted questions and answers. As is typical in IJ proceedings, no court reporter was present. Rather, the proceedings were tape recorded. Later, a transcript was made of that tape recording and was used by the parties, by BIA, and by the Court of Appeals.

With the assistance of the Solicitor General's office, counsel for Mr. Aguirre herein recently obtained a copy of the official tape recording of the IJ hearing. A review of

the tape recording reveals both that the interpreter made mistakes in the interpretation of crucial aspects of the questions and answers at critical junctures, and that the transcriber committed at least one significant error, changing the meaning of crucial testimony.

The BIA, the Court of Appeals, and the INS all believed that Mr. Aguirre had said he stoned people, hit them with rocks. The dissent said "Hitting someone on the head with . . . a stone in the nature of a brick . . . " Pet. at 10a. But the hearing tape does not support this version of the facts.

Mr. Aguirre was asked on cross-examination by the INS trial attorney (TA): "And, were there any people on board these buses when you did this?" [when Mr. Aguirre and his compatriots burned the buses]. The interpreter correctly interpreted his answer, which was: "No, because we would stop the bus, help all the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus." AR 93.[1]

It is clear from the taped testimony that the stone-throwing was part of the process of clearing the buses of people so they would not be hurt when the buses were burned. In the immediate next question, the TA asked Mr. Aguirre whether anyone was hurt "during any of these bus burnings or stonings?" Mr. Aguirre said no. In subsequent questions, the TA asked specifically about the stoning of people, but very significantly, the interpreter

[1] AR refers to the administrative record before the Court of Appeals.

omitted those parts of the questions – perhaps because she knew Mr. Aguirre had not testified that he threw rocks at people, and in her mind, she was keeping the record straight.

Specifically, the TA asked: "When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?" The interpreter omitted the phrase "throwing rocks and things at people." AR 94. Again, the TA asked, "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?" AR 94. The interpreter omitted words, "throw rocks at them."

In sum, Mr. Aguirre was not told that the TA believed he had thrown rocks at people. The record reflects these questions, but no denials or clarifications by Mr. Aguirre. Mr. Aguirre's then-counsel did not clarify the matter either, apparently because he did not understand Spanish.

Mr. Aguirre explained that if the people on the bus would "heed" the protesters, they (the passengers) would leave the bus. AR 93. The interpreter interpreted correctly, but the transcript shows this: "But, if they be, I mean if they hit our, uh, bus then we get off the bus."

Other language problems color the transcript. Mr. Aguirre testified that if people did not leave the bus, the protesters would hit them with "sticks." AR 93. The word he used for "sticks" is "palos" which also may refer to a small tree branch, and which conveys a far different

concept than "baseball bat," the term used by the dissent in the Court of Appeals. Regarding the tying of the bus passengers, as part of his explanation, Mr. Aguirre said "asi," which essentially means, "like this." This indicates that Mr. Aguirre was demonstrating how he tied people, presumably by the wrists to lead them out of the bus, not lynch-mob style as the dissent below implies. The word "asi" and the explanation do not appear in the record. AR 93.

Mr. Aguirre testified that the protesters would break the windows of the stores and, using vernacular, he said "trash" them. The interpreter said "raid them. Taking everything they have."–AR 94. This was the interpreter's erroneous expansion, not Mr. Aguirre's testimony. Fortunately, in this instance the TA asked a follow-up question that was properly interpreted, so Mr. Aguirre clarified that the protesters would not steal anything but rather would leave the stores' contents on the floor. AR 94.

Mr. Aguirre was asked this question by the TA: "Do you think the government would be able to control those who are threatening you?" AR 92. The interpreter completely misinterpreted the question, asking Mr. Aguirre if he feared persecution by the government. No one realized the mistake and the matter never was clarified.

The BIA's decision, the Court of Appeals' dissent, and the INS's Petition all are grounded on their belief

that Mr. Aguirre committed serious crimes against civilians in Guatemala. The hearing tape demonstrates that the facts are not as everyone believed.[2]

REASONS FOR DENYING THE PETITION

As noted above, the Petition for Certiorari is based on an erroneous concept of the facts. The Petition also misconstrues what the Court of Appeals did below, misconstrues the magnitude of the issue, and claims there is a circuit split when there is not. A decision in this case would be largely advisory, having no application beyond the narrow confines of a seldom-invoked exception to a limited ground of relief from deportation. The number of cases and number of people even potentially affected by this court's decision would be minuscule, despite the INS's contentions to the contrary. Moreover, this Court's decision on the question raised would not dispose of the case, as there are independent grounds on which the Court of Appeals could reverse the BIA.

I. The Court of Appeals' Decision is An Unremarkable Example of Proper Judicial Review.

A. The petition construes this case as a purported example of the Court of Appeals' improperly usurping

[2] As Mr. Aguirre's counsel has informed counsel for the INS, she will obtain a full and accurate transcript of both Spanish and English testimony, using the services of a certified court interpreter, and will lodge the transcript with the Court and provide a copy to the INS.

the discretion of the Attorney General. In fact, the Court of Appeals applied the proper degree of deference, imposed the correct standard of review, and reached the correct result on the merits.

The Court of Appeals applied the proper standard of review in reviewing purely legal issues: de novo. The judiciary is the final authority on issues of statutory construction. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984); *Demarest v. Manspeaker, et al.*, 498 U.S. 184, 190 (1991). No deference is afforded an agency's interpretation of strictly legal terms, with respect to which it has no particular expertise. *Batanic v. INS*, 12 F.3d 662, 665-666 (7th Cir. 1993); *Institute for Technology Development v. Brown*, 63 F.3d 445, 450 (5th Cir. 1995).

The Court of Appeals did not substitute its judgment for the BIA's. Rather, it faulted the BIA for the agency's failure in procedure, that is, failure to properly consider all the facts and circumstances of Mr. Aguirre's withholding application. Specifically, the Court said the BIA committed three errors of law in evaluating Mr. Aguirre's withholding application: 1) failing to consider Mr. Aguirre's offenses in relation to his declared political objectives. Pet. at 4a; 2) failing to consider and properly apply relevant Ninth Circuit law in determining whether Mr. Aguirre's acts were "political." Pet. at 6a; 3) failing to consider the persecution Mr. Aguirre might suffer if deported to Guatemala. Pet. at 6a.

The Court of Appeals below is by no means the only court to have reversed the BIA for failing to apply the correct standards or for failing to properly consider all

the facts and circumstances in an application for relief from deportation. *See Abdel-Masieh v. U.S. INS*, 73 F.3d 579 (5th Cir. 1996); *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992); *Babai et al v. INS*, 985 F.2d 252 (6th Cir. 1993); *Akinyemi v. INS*, 969 F.2d 285 (7th Cir. 1992); *Guillen-Garcia v. INS*, 999 F.2d 199 (7th Cir. 1993); *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995); *Batanic v. INS*, 12 F.3d 662 (7th Cir. 1993); *Dulane v. INS*, 46 F.3d 988 (10th Cir. 1995); *Turri v. INS*, 997 F.2d 1306 (10th Cir. 1993). Many other cases have reversed the BIA for making errors of law, just as the Court did below. *See Goncalves v. INS*, 6 F.3d 830 (1st Cir. 1993); *Rosario v. INS*, 962 F.2d 220 (2d Cir. 1992); *Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993); *White v. INS*, 75 F.3d 213 (5th Cir. 1996); *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995); *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995).

The Court of Appeals in this case properly reversed the BIA, among other reasons, because in overturning the IJ's grant of withholding, the BIA failed to follow its own precedent. The BIA frequently has said that the IJ's credibility findings are entitled to "substantial deference." *Matter of Pula*, 19 I & N Dec. 467 (BIA 1987) and cases cited therein. The IJ's determinations must be given significant deference by reviewing courts and the BIA because the IJ is in the best position to observe the demeanor of the witness. *Matter of Kulle*, 19 I & N Dec. 318, 331 (BIA 1985); *Matter of Boromand*, 17 I & N Dec. 450, 452 (BIA 1980); *Matter of A___S___*, Int. Dec. 3336 (BIA 1998). Yet in this case, the BIA discarded the careful and considered judgment of the IJ.

Further, "the Attorney General" adopted opposing views in this case. Both the IJ and the BIA are delegatees

of the Attorney General.[3] This kind of internal conflict has led this Court to reject the INS's request for deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987). Circuit Courts also may be less willing to defer to the decisions of the BIA when they reverse an IJ's grant of relief. *See*, for example, *Martinez-Benitez v. INS*, 956 F.2d 1053, 1056 (11th Cir. 1992) (BIA should have considered the IJ's findings and grant of relief in considering the proper weight to give the conviction).

The BIA also ignored its own precedent in deciding the merits of the case. The agency has acknowledged that violent actions may be the only option in countries where citizens have no opportunity to seek change in the political structure of the government through peaceful processes. *Matter of Izatula*, 20 I & N Dec. 149, 153-154 (BIA 1990), citing *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988); *Matter of Rodriguez-Majano*, 19 I & N Dec. 811, 815 (BIA 1988) (activities directly related to a civil war, including the engaging in military actions, the burning of cars and the destruction of other property is not persecution of others). The BIA said:

> Were we to hold that practices such as attacking military bases, destroying property or [burning cars] constitute persecution [of others], members of armed opposition groups throughout the world would be barred from seeking haven in this country. . . . We do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict."

[3] *See* 8 C.F.R. § 1.1(l); 8 C.F.R. § 3.0(a).

Rodriguez-Majano, 19 I & N Dec. at 816. Contrary to the dissent's argument that, "The United States should be a haven for innocent people fleeing persecution," the BIA has conceded that withholding is not to be used as a reward for perfect behavior nor as a punishment for bad behavior.

Furthermore, reduced deference is appropriate where the agency has been inconsistent, as the INS has been in implementing the bar on serious non-political crimes. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988). In 1988, the INS interpretation of the serious non-political crimes bar was entirely consistent with the Court of Appeals' decision below. Directing how these cases were to be handled, the INS said:

> [E]vidence of the commission of such non-political crimes will now be a discretionary factor to be considered together with the totality of circumstances and equities on a case-by-case basis consistent with the proper intent of the Refugee Act of 1980 as well as the 1951 U.N. Convention and 1967 Protocol Relating to the Status of Refugees.

53 Fed. Reg. 11300, 11301 (April 6, 1988).[4]

If the agency has reversed its position on the application of this bar, then the agency is not entitled to deference on this point. If, however, the agency's interpretation of this bar

[4] Referring to the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (reprinted in 19 U.S.T. 6259) and the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 (hereafter Protocol).

is still as it was in 1988, then the agency's interpretation is not at odds with the Court of Appeals.

The INS repeatedly cites the Attorney General's Opinion, *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Op. Off. Legal Counsel 1 (1989), rev'd, *Doherty v. INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992). Pet. at 14, 19, 20, 22. That the INS attempts to cite this opinion as precedent highlights the odd position of the Attorney General in immigration matters: she is at once a party and the final administrative adjudicator.

Moreover, the INS concedes that the Attorney General's decision in *Doherty* was reversed by the Second Circuit, albeit on other grounds. *Doherty v. INS*, 908 F.2d at 1121-22. This Court reversed the decision of the Second Circuit, *INS v. Doherty*, 502 U.S. 314, but did not reach the issue cited by the INS in its certiorari petition. Thus, even if the original decision of the Attorney General had any precedential value, it surely retains none. That the INS resorted to repeatedly citing this 1989 Legal Opinion by the Attorney General demonstrates that there is little authority for its position.

B. The Court of Appeals was correct that the BIA misapplied rulings of this Court and the Circuit when it refused to follow the Handbook[5] and Protocol. This Court has directed that the definition of "refugee" is to be construed consistently with the U.N. Protocol. *INS v.*

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[5] Referring to the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol to the Status of Refugees*, (Jan. 1988), hereafter Handbook.

Stevic, 467 U.S. 407, 426, n.20 (1984). The Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform." *Cardoza-Fonseca*, 480 U.S. at 439, n. 22. The High Commissioner's analysis as expressed in the Handbook, this Court said, is consistent with its own. *Id.* Regarding the serious non-political crime exception, the Handbook says that:

> [I]t is also necessary to strike a balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

Handbook, paragraph 156, emphasis in original.

The Court of Appeals was correct to remand the case for the BIA to reconsider this case consistent with the Handbook and Protocol and with the BIA's own precedent.

II. The Serious Non-Political Crimes Bar to Withholding is Almost Never Invoked, and That Fact Will Not Change With the Recent Amendment of the INA.

A. The INS also misconstrued the magnitude of this issue. This Court's decision in this case would be largely advisory because this bar to withholding applies to so few people. Further, the legal issue here is narrow because the Court's ruling applies only to *this* bar to withholding, not to other bars nor to other forms of relief.

Within the narrow field of immigration law, there is the far narrower area known as relief from deportation. This area encompasses waivers and other remedies by which noncitizens seek to avoid being deported. Within this narrow area is the still narrower topic at issue in this case: withholding of deportation. Withholding of deportation is available to people who prove it is more likely than not that they will be persecuted if deported. *Stevic*, 467 U.S. at 429-30. Specifically, the INS is prohibited from deporting the person to a country where his or her life or freedom would be threatened on account of one of the five statutory grounds. *Id. and see* INA § 243(h), 8 U.S.C. § 1253(h).[6] A person granted withholding does not gain any immigration status as a result of having his or her deportation withheld.

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[6] Except as noted, all statutory references are to the statute as it existed prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). For consistency, after the first reference, Respondent will refer to statutory sections with the INA section number rather than the United States Code section number.

Asylum is a different form of relief.[7] *See* INA § 208, 8 U.S.C. § 1158. In some aspects, proving eligibility for asylum is easier than proving eligibility for withholding. *See Cardoza-Fonseca*. Also, a person granted asylum can adjust his or her status to lawful permanent residence after one year. INA § 209, 8 U.S.C. § 1159. However, whether to grant asylum is a matter of discretion for the INS; withholding is mandatory. *Stevic*, 467 U.S. at 421-22, n. 15; *INS v. Doherty*, 502 U.S. 314, 332 (1992) (Scalia, concurring/dissenting) ("Because of the mandatory nature of the withholding-of-deportation provision, the Attorney General's power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum and suspension of deportation. Our decision in *INS v. Abudu*, 485 U.S. 94 (1988) reflects this.")

A withholding applicant must show a "clear probability" of persecution. *Cardoza-Fonseca*, 480 U.S. at 423; *Stevic*, 467 U.S. at 429-430. This is a high burden of proof. Narrowing the subset of withholding-eligible people even further are statutory and regulatory exceptions to the granting of withholding of deportation. One of the least invoked of those exceptions is at issue in this case: the bar to withholding for commission of "serious non-political crimes" found at § 243(h)(2)(C).

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[7] Although Mr. Aguirre applied for and was granted asylum, the BIA and the Court of Appeals focused on the withholding application, and the INS petitions for certiorari only on the withholding issue.

Few cases have even applied this exception to withholding of deportation, much less considered the balancing question at issue here. There are only five reported cases in which the BIA considered whether the "serious non-political crime" bar applied. *Matter of Rodriguez-Palma*, 17 I & N Dec. 465 (BIA 1980) (modified on other grounds, *Matter of Gonzalez*, 19 I & N Dec. 682 (BIA 1988)); *Matter of Ballester-Garcia*, 17 I & N Dec. 592 (BIA 1980) (modified on other grounds by *Gonzalez*); *Matter of Doural*, 18 I & N Dec. 37 (BIA 1981) (modified on other grounds by *Gonzalez*); *Matter of Ramirez-Rivero*, 18 I & N Dec. 135 (BIA 1981); *Matter of McMullen*, 19 I & N Dec. 90 (BIA 1984). In two other cases the BIA discussed the serious non-political crimes bar in dicta. *Matter of Rodriguez-Coto*, 19 I & N Dec. 208 (BIA 1985) (modified on other grounds by *Gonzalez*); *Matter of Frentescu*, 18 I & N Dec. 244 (BIA 1982) (modified on other grounds by *Gonzalez*).

Unlike this case, all these BIA cases concerned asylum *and* withholding. Almost all involved Cuban nationals who came to the United States after being released from Cuban prisons during the Mariel boatlift. The boatlift was a complex and unique situation, raising legal and political issues that were *sui generis*.

The Circuit Courts of Appeals have had even fewer occasions to rule on the "serious non-political crimes" bar. There is no circuit split; as discussed below, the case the INS cites as creating a circuit conflict, *Garcia-Mir v. Smith*, 766 F.2d 1478, 1487 n. 10 (11th Cir. 1985) *cert. denied sub nom. Marquez-Medina v. Meese*, 475 U.S. 1022 (1986) did not involve or decide this issue. Indeed, the case

below is the only federal court ruling squarely on this issue.

The dearth of cases applying the serious non-political crime bar is especially striking because from at least 1980 to 1990, the INS's own asylum regulations included precisely this same ground of disqualification. The regulation appeared first at 8 C.F.R. § 208.8(f)(1)(v), then at 208.13(c)(2) (proposed rule). *See also* 52 Fed. Reg. 32557 (Aug. 28, 1987); 53 Fed. Reg. 11301, 11306 (April 6, 1988); 55 Fed. Reg. 30674, 30683 (July 27, 1990). In 1988, the INS proposed deleting the serious non-political crimes bar from the regulations because the agency had "serious concerns with respect to the difficulties in determining the validity of allegations of 'serious non-political crimes.' " 53 Fed. Reg. 11300, 11301, 11306 (April 6, 1988). The bar was in fact deleted in 1990. 55 Fed. Reg. 30674, 30683 (July 27, 1990).

In an effort to make the "serious non-political crimes" bar appear more important than it is, the INS repeatedly cites to the 1996 IIRIRA amendment adding the "serious non-political crime" provision as a "new" ground of disqualification from asylum. The INS argues that this issue has "added importance now" because the § 243(h)(2)(C) withholding bar has been extended by IIRIRA § 604(a) to asylum cases.

Once again the INS's Petition misconstrues the situation. The IIRIRA amendment only codified the asylum regulation that had been in place for at least a decade. The regulation could scarcely have escaped the INS's notice: beginning in 1980 and continuing through 1998, occasional BIA and federal court cases – including cases

cited by the INS in its brief – cite this regulation. *See Garcia-Mir*, 766 F.2d at 1487 n. 10; *McMullen*, 19 I & N Dec. 90; *Matter of McMullen*, 17 I & N 542, 544, n. 2 (BIA 1980); *Saiyid v. INS*, 132 F.3d 1380 (11th Cir. 1998); *Azzouka v. Sava*, 777 F.2d 68, 73 (2d Cir. 1985); *Matter of Doural*, 18 I & N Dec. 37 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I & N Dec. 135 (BIA 1981). In sum, although this bar was in the regulations for a decade, only a handful of cases had applied it to an asylum application, and most were *sui generis*. That the same bar is now in the asylum statute has not changed matters: the INS does not point to decisions of either the BIA or the Courts of Appeals applying this "new" IIRIRA asylum bar. The 1996 IIRIRA amendment has not resulted in a flood of cases presenting this issue, nor is it reasonable to expect such a flood.

B. The potential pool of cases presenting the "serious non-political crimes" bar to asylum or withholding is narrowed still further by the separate bar for persons convicted of an "aggravated felony" and particularly by the increasingly expansive definition of that term. *See Matter of S___S___*, Int. Dec. 3317 (BIA 1997); INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); *Matter of C___*, 20 I & N Dec. 529 (BIA 1992); *Choeum v. INS*, 129 F.3d 29, 42 (1st Cir. 1997). Since 1990, a person convicted of an aggravated felony has been statutorily ineligible for asylum, even if he or she were convicted outside the United States. INA § 208(d), as added by § 515(a)(10) of the Immigration Act of 1990; § 101(a)(43). The current (post IIRIRA) asylum bar for people convicted of aggravated felonies is at INA § 208(b)(2)(B)(i).

Before 1996, a person convicted of an aggravated felony was deemed to be convicted of a particularly serious crime, precluding a grant of withholding. INA § 243(h)(2)(B). *But see*, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 413(f), *Matter of Q___T___M___T___*, Int. Dec. 3300 (BIA 1996). Under current law, people convicted of aggravated felonies who were sentenced to at least five years imprisonment are considered to have been convicted of a particularly serious crime, making them ineligible for withholding. Current INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).

The definition of "aggravated felony" has been expanded steadily since it was first applied in the immigration context in 1988. It was expanded again in IIRIRA, so that many crimes that were not previously aggravated felonies may now be so classified. *See* IIRIRA § 321(b). *Matter of Yeung*, Int. Dec. 3297 (BIA 1996). Convictions that might otherwise be considered to be serious non-political crimes committed outside the United States would be classified as aggravated felonies, and asylum and withholding would be barred without resort to the serious non-political crimes bar.

In fact, with the possible exception of *McMullen*, in *all* the BIA cases presenting the serious non-political crimes bar, the applicant had been convicted of a crime that presumably now would be held to be an aggravated felony. In practice, those few cases that applied this bar in prior decisions would not even reach the BIA now. Typically, the IJ would pretermit the withholding and asylum applications based on the easily applied aggravated felony bar without reaching the serious non-political crimes bar. *See Matter of C___*, 20 I & N Dec. 529 (BIA 1992).

C. This case is factually and legally insignificant also because a decision here would resolve this issue only in the withholding context, not in the asylum context. If, *arguendo*, the INS is correct that in the future the serious non-political crimes bar will arise more frequently because the bar now is in the asylum statute, then the Court can and should await a case presenting the balancing issue in an asylum case. Any ruling on the bar in the withholding context would not necessarily apply in the asylum context. As this Court does not render advisory opinions or resolve questions not before it, the Court's resources would be better reserved to resolve this issue, if need be, in a case concerning both asylum and withholding.

D. In addition, the Court of Appeals' decision applies only to this particular bar to withholding of deportation, § 243(h)(2)(C). It does not apply to the other, more commonly applied bars, including the "particularly serious crime," § 243(h)(2)(B), or "persecutor of others," § 243(h)(2)(A).

Regarding the former, the Ninth Circuit already has held that no balancing applies to the "particularly serious crime" bar. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397-98 (9th Cir. 1987). *See also Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994), citing *Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 (9th Cir. 1993). In *Ramirez-Ramos* the Court distinguished the "particularly serious crimes" bar of § 243(h)(2)(B) from the "serious non-political crimes" bar of § 243(h)(2)(C). It implied – but did not hold – that in applying the "serious non-political crimes" bar the adjudicator should balance the risk of persecution against the

crime committed outside the United States. It is instructive that the Ninth Circuit did not revisit the § 243(h)(2)(C) balancing question in the decade following the *Ramirez-Ramos* decision.

The INS argues that the Court of Appeals' decision in this case is inconsistent with the same Circuit's decision in *Ramirez-Ramos*. However, the two cases pertain to two different bars to withholding. *Ramirez-Ramos* anticipated the *Aguirre* holding by distinguishing the particularly serious crime bar from the serious non-political crime bar.

Moreover, even if, arguendo, the two decisions are inconsistent, that is not cause to grant certiorari in this case. This Court does not sit to make one circuit's law internally consistent. The *Aguirre* decision did not discuss or distinguish *Ramirez-Ramos*; in the unlikely event there is a future case pertaining to this bar, if the Court of Appeals should believe the two cases are inconsistent, it can remedy the inconsistency, either in a panel decision or in an *en banc* decision.

III. The Court of Appeals' Decision Does Not Create a Circuit Conflict.

Not surprisingly, considering the insignificance of this issue and the paucity of cases on this topic, there is no conflict among the Circuit Courts of Appeals. The sole case the INS points to as the "circuit conflict" is *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied sub nom. Marquez-Medina v. Meese*, 475 U.S. 1022 (1986). Tellingly, the INS does not attempt to argue that the case itself actually pertains to this issue.

In *Garcia-Mir*, the Eleventh Circuit did not squarely hold that the Attorney General may not consider the degree of possible persecution and the seriousn ss of the crime committed. Rather, the "conflict" the INS cites was dictum in a footnote regarding a tangential issue, buried deep in a complex, multi-layered decision about Mariel Cubans, exhaustion of administrative remedies, and jurisdiction of the district court in exclusion cases. *Id.* at 1487, n. 10.

The issues in *Garcia-Mir* were: 1) whether the district court exceeded its authority in ordering the government to resume its procedures for releasing Mariel boatlift Cubans; and 2) whether the district court erred in ordering the BIA to reopen two class members' exclusion hearings and in extending that order to all class members. The case did not address nor hold anything on the substance or merits of the serious non-political crimes bar. The footnote the INS cites as creating the circuit conflict is in the section of the case addressing whether the district court had properly ordered the BIA to reopen the class members' cases. The court agreed with the INS that the BIA's disposition of the two class members' cases did not satisfy the jurisdictional exhaustion requirements for the rest of the class. The footnote concerned both withholding and asylum, further distinguishing it from this case.

Significantly, a decision issued three years after *Garcia-Mir* reversed the BIA for *failing* to weigh the applicant's crime against the favorable evidence. In *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988), the applicant had been convicted of a drug trafficking crime. The IJ and BIA held he was statutorily ineligible for withholding and refused to consider his asylum application. *Id.*, at 274.

The Court reversed, holding that, although the narcotics offense was "an adverse factor which [sic] would militate heavily against him in the review of his asylum application," the conviction was "not the only evidence to be considered by the [IJ]." *Id.* at 276. The applicant must be afforded a meaningful opportunity to be heard, followed by the IJ's "careful consideration of the *weight to be given such evidence.*" *Id.*, emphasis added.

The Eleventh Circuit has not addressed this issue again since 1988 and no other Circuit Court has decided the matter. There is no Circuit conflict. Certiorari is not appropriate.

IV. There Were Independent Grounds For The Court of Appeals' Decision.

Granting certiorari is not appropriate here because there were independent grounds for the Court of Appeals to reverse the BIA's decision, that is, grounds not addressed by the Court of Appeals. Because the Court of Appeals did not reach these issues, and because the remand to the agency would be correct for any one of these alternative reasons, this Court's decision will not end this case.

A. Remand pursuant to AEDPA § 413(f)

Mr. Aguirre argued below that the case should be remanded because Congress had recently amended the INA to permit a grant of withholding of deportation even where the applicant had committed a serious non-political crime outside the United States. § 413(f) of the

AEDPA, amending INA § 243(h). *See Choeum*, 129 F.3d at 41-43; *Matter of Q___T___M___T___*, Int. Dec. 3300 (BIA 1996). The government responded below that the amendment did not apply to Mr. Aguirre because his case was "final" before the amendment took effect, citing § 413(g) of the AEDPA.

The Court of Appeals skirted the issue, saying that the Court already was bound to apply the standards of the Protocol, pursuant to *McMullen*. Pet. at 4a. Instead, the Court properly could have found that the amendment applied to Mr. Aguirre and then could have remanded to the BIA for it to consider the amendment's affect on this case. Or, the Court properly could have remanded for the BIA to determine if the amendment applied to Mr. Aguirre and if so, how it would affect this case. The Court could have remanded on the basis of the AEDPA amendment without reaching any of the issues discussed in the INS's Petition for Certiorari.

B. "Serious Reasons to Consider"

The Court of Appeals also could have reversed the BIA's decision because the BIA failed to properly and adequately evaluate whether the "serious reasons to consider" prong of § 243(h)(2)(C) was met. To meet this prong, there must be convincing and reliable evidence that serious non-political crimes were committed and that they were committed by the applicant. *See McMullen v. INS*, 788 F.2d 591, 598-99 (9th Cir. 1986). As the INS itself conceded in 1988, when it proposed deleting this bar from its regulations, determining the validity of charges

of "serious non-political crimes" is very difficult.[8] *See, e.g., Matter of Doural*, 18 I & N Dec. 37, 38-39 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I & N Dec. 135, 139 (BIA 1981).

The BIA glossed over this prong in Mr. Aguirre's case. This was reversible error as well. The IJ observed that Mr. Aguirre had not been investigated, charged or prosecuted for any crime by the police in Guatemala. Pet. at 30a. The only evidence of any criminal conduct was from the transcript of Mr. Aguirre's testimony. The Court of Appeals could have remanded on this basis as well, directing the BIA to properly evaluate whether this prong was met.

C. The BIA's First and Second Errors of Law

The INS's chief complaint with the Court of Appeals' decision – that the Court required the BIA to balance the persecution Mr. Aguirre will face against his criminal conduct – was the Court's third and last reason for reversing the BIA. Pet. at 6a. The Court did not reverse solely or even primarily on this basis.

The first error of law the Court found was that the BIA did not consider Mr. Aguirre's offenses in relation to his declared political objectives. Pet. at 4a. The second error of law was that the BIA failed to consider and properly apply relevant Ninth Circuit law in determining whether Mr. Aguirre's acts were "political." Pet. at 6a. Either of these other errors of law is a proper and sufficient basis for reversing the BIA's decision. This Court's

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[8] 53 Fed. Reg. 11300, 11301, 11306 (April 6, 1988).

holding regarding the balancing of persecution versus crime will not dispose of these other issues.

CONCLUSION

Because the facts are not as the BIA and the Court of Appeals believed, this Court should not grant the writ of certiorari. Further, the case was properly and correctly decided by the Court of Appeals.

The petition should be denied. Alternatively, in light of the deficient record, Respondent respectfully requests this Court to vacate the BIA's opinion and remand to the agency with instructions to take new evidence and rehear Mr. Aguirre's applications for withholding and asylum.

Respectfully submitted,
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